TRANSCRIPT OF RECORD

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 309

THE UNITED STATES OF AMERICA, APPELLANT

vs.

DURKEE FAMOUS FOODS, INC.

PEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED AUGUST 30, 1938

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 309

THE UNITED STATES OF AMERICA, APPELLANT

vs.

DURKEE FAMOUS FOODS, INC.

PEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

INDEX

	Original	Print
ord from D. C. U. S., District of New Jersey	A	1
Indictment	1	1
Plea in bar to indictment	18	10
Answer to plea in bar to indictment	22	12
Opinion sustaining plea in bar	25	14
Order sustaining plea in bar	30	16
Order extending term of Court	32	17
Petition for appeal	35	17
Assignments of error	37	18
Order allowing appeal	40	19
Citation and service [omitted in printing]	41	20
Docket entries	42	20
Praecipe for transcript of record	43	20
Clerk's certificate [omitted in printing]	45	21
cerpts from record in D, C. U. S., District of New Jersey, Case No. 6821–b	46	21
Indictment	46	21
Motion to quash	59	29
Stipulation of counsel	61	30
Memorandum, Fake, J	62	31
Correcting memorandum, Fake, J	65	33
Clerk's certificate [omitted in printing]	65–A	33
ipulation re enlargement of record etc	66	33
tement of points to be relied upon and designation as to printing record	68	34

In United States District Court, District of New Jersey

Benjamin F. Havens, Clerk of the District Court of the United s for the District of New Jersey, do hereby certify that the ed is a true copy of Indictment No. 7918b in U. S. vs. Durkee ous Foods, Inc., filed April 9, 1937, as the same remains of record, n file in my office.

testimony whereof, I have hereto subscribed my name and d the seal of said Court, at Trenton, in said District, this 26th of August A. D. nineteen hundred and thirty-eight.

AL] BENJAMIN F. HAVENS,
Clerk.

Per AMY D. BOND,
Deputy Clerk.

In United States District Court, District of New Jersey

Indictment

Filed April 9, 1937

the District Court of the United States of America in and for istrict of New Jersey, at the January Term thereof, in the year

e Grand Jurors of the United States of America duly empaneled, , and charged to inquire in and for the body of the said ict of New Jersey, upon their oaths present:

COUNT 1

That throughout the period extending from January 1, 1932, to ncluding December 31, 1933, Durkee Famous Foods, Inc., here- r called defendant, was and still is, a corporation of the of Illinois, having a place of business in New York, in the State w York.

That throughout said period Lehigh Valley Railroad Company ere Marquette Railway Company were, and still are, corpora- ommon carriers engaged in the transportation of property, in ate commerce, by railroad, for hire, and over and by means of espective connecting railway lines, operated a through railway for the transportation of property, including palm oil, in car- ots, from alongside vessels and other points in New York r to Chicago in the State of Illinois.

That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint rate and charge l carriers for the transportation of palm oil, in carload lots, longside vessels and other points in said New York Harbor, id through railway route to said Chicago, to be 40 cents per unds, said rate being hereinafter referred to as the line haul

rate; that said schedules and tariffs providing said line haul ra
further provided that said line haul rate applied from points with
free lighterage limits of said New York Harbor as provided for
in accordance with certain tariffs and schedules governing the acce
ance and handling of freight, at, and for all deliveries in, said Ne
York Harbor, which said last named tariffs and schedules had be
duly printed and had been published and had been filed with th
Interstate Commerce Commission by said Lehigh Valley Railroa
Company; that said last mentioned tariffs and schedules provid
and defined free lighterage and floatage limits in said New Yo
Harbor and further provided that, when ordered by the shipper o
consignee in writing and tank barges were available, such articl
therein designated as "not lighterage free," including palm oil, wou
be handled in tank barges in lots of 240,000 pounds or more, in l
of tank cars on floats, from alongside steamship in said free ligh
erage and floatage limits in said New York Harbor as defined in sa
schedules and tariffs to the rail terminals of said Lehigh Valle
Railroad Company, the transfer from tank barges to tank cars to b
at the expense of the shipper or consignee, for which service a charg
of 2 cents per 100 pounds, hereinafter referred to as pumping charg
would be made in addition to said line haul rate; that said rate of
cents per 100 pounds and said pumping charge of 2 cents
3 per 100 pounds were the lawful rates and the only lawful rate
applicable on the shipment of palm oil hereinafter described.

4. That during said period on, to wit, August 12, 1932, said defend
ant tendered to said Lehigh Valley Railroad Company at Pier 6
North River, in the State of New York, such point being within sa
free lighterage and floatage limits of said New York Harbor as de
fined in said schedules and tariffs, together with other shipments o
palm oil weighing in excess of 240,000 pounds, a shipment of palm
oil of an aggregate weight of, to wit, 120,880 pounds, that being tw
carload lots, which said palm oil was part of a larger lot of palm oil
theretofore transported to said New York Harbor by a certain vessel
to wit, S. S. "Georgic," with directions to transport said 120,88
pounds of palm oil from said Pier 60 in said New York Harbor over
said connecting railway lines, to said Chicago, consigned to said
defendant.

5. That during said period on, to wit, August 5, 1932, said defend
ant did order in writing from said Lehigh Valley Railroad Company
tank barges in lieu of tank cars on floats for the handling from along
side said vessel in said New York Harbor to the rail terminal of said
Lehigh Valley Railroad Company at Claremont Terminal in the
State of New Jersey, of said lots of palm oil which had been trans
ported as aforesaid to said New York Harbor by said vessel.

6. That said Lehigh Valley Railroad Company did thereupon, a
said Pier 60, accept delivery of said 120,880 pounds of palm oil
4 and, tank barges being then and there available, did handle, by
and through its agent, Manhattan Lighterage Corporation, a

tion of the State of New York, said lot of palm oil by tank rom said Pier 60 to said rail terminal at said Claremont Ter- nd at said Claremont Terminal did pump, by and through its aid Manhattan Lighterage Corporation, said palm oil into railway tank cars bearing the initials and numbers ISTX 227 TX 285; that thereafter said common carriers did transport oad said shipment loaded in and upon said railway tank cars, esaid, over said connecting railway line, and in and through trict of New Jersey and within the jurisdiction of this Court, Chicago, and did deliver said shipment at said Chicago to fendant and did collect from said defendant freight charges mount of, to wit, $483.54, based only upon the aforesaid line te of 40 cents per 100 pounds and said weight of, to wit, 120,880

at on, to wit, August 17, 1932, said Manhattan Lighterage ation, pursuant to an arrangement and agreement theretofore ith said defendant, and with intent secretly to assume and for the benefit of said defendant, said pumping charge of 2 r 100 pounds provided in said schedules and tariffs and appli- pon said shipment of palm oil, did pay and cause to be paid Lehigh Valley Railroad Company, said pumping charge in of, to wit, $24.18, being at the rate of 2 cents per 100 pounds he aforesaid weight of, to wit, 120,880 pounds.

hat said defendant did pay, for the transportation including aid pumping of the oil from tank barge to tank cars, said um of $483.54, and only said sum of $483.54 instead of the law- ful aggregate freight charge, applicable under the aforesaid and schedules, of, to wit, $507.72, based and computed upon e haul rate of 40 cents per 100 pounds, and said weight of, to 0,880 pounds, plus said pumping charge of 2 cents per 100 , and said weight of, to wit, 120,880 pounds; and said defend- refrain from paying said common carriers or either of them, other person or corporation, said pumping charge of 2 cents pounds, applicable upon said shipment of palm oil under and e of said tariffs and schedules.

at on, to wit, August 17, 1932, Durkee Famous Foods, Inc., nt aforesaid, in the District of New Jersey and within the tion of this Court, well knowing the premises aforesaid, un- y did knowingly, by means of the device aforesaid, solicit, and receive a concession of 2 cents per 100 pounds in respect transportation of the aforesaid shipment of property by said n carriers in interstate commerce, whereby said property was rted from said point in New York Harbor to said Chicago ss rate and charge than that named and provided in the es and tariffs of said common carriers published and filed as id; contrary to the form of the statute in such case made ovided and against the peace and dignity of the United

6

COUNT 2

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs number 1, 2 and 3 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, August 12, 1932, said defendant tendered to said Lehigh Valley Railroad Company at Pier 60, North River, in the State of New York, such point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 121,000 pounds, that being two carload lots, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Georgie", with directions to transport said 121,000 pounds of palm oil from said Pier 60 in said New York Harbor over said connecting railway lines, to said Chicago, consigned to said defendant.

3. That during said period on, to wit, August 5, 1932, said defendant did order in writing from said Lehigh Valley Railroad Company tank barges in lieu of tank cars on floats for the handling from alongside said vessel in said New York Harbor to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lots of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did thereupon, at said Pier 60, accept delivery of said 121,000 pounds of palm oil and said tank barges being then and there available, did handle, by and through its agent, Manhattan Lighterage Corporation, a corporation of the State of New York, said lot of palm oil by tank barge from said Pier 60 to said rail terminal at said Claremont Terminal, and at said Claremont Terminal did pump, by and through its agent, said Manhattan Lighterage Corporation, said palm oil into certain railway tank cars bearing the initials and numbers ISTX 267 and ISTX 194; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank cars, as aforesaid, over said connecting railway line, and in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did deliver said shipment at said Chicago to said defendant and did collect from said defendant freight charges in the amount of, to wit, $484.00, based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 121,000 pounds.

5. That on, to wit, August 17, 1932, said Manhattan Lighterage Corporation pursuant to an arrangement and agreement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge

of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and to be paid to said Lehigh Valley Railroad Company, said pumpharge in the sum of, to wit, $24.20, being at the rate of 2 cents 00 pounds upon the aforesaid weight of, to wit, 121,000 pounds. That said defendant did pay, for the transportation including umping of the oil from tank barge to tank cars, said sum of $484.00 nly said sum of $484.00 instead of the lawful aggregate freight e, applicable under the aforesaid tariffs and schedules, of, to 508.20, based and computed upon said line haul rate of 40 cents 00 pounds, and said weight of, to wit, 121,000 pounds, plus said ing charge of 2 cents per 100 pounds, and said weight of, to wit, 00 pounds; and said defendant did refrain from paying said non carriers or either of them, or any other person or corporation, pumping charge of 2 cents per 100 pounds, applicable upon said nent of palm oil under and by virtue of said tariffs and schedules. That on, to wit, August 17, 1932, Durkee Famous Foods, Inc., dant aforesaid, in the District of New Jersey and within the diction of this Court, well knowing the premises aforesaid, unully did knowingly, by means of the device aforesaid, solicit, t, and receive a concession of 2 cents per 100 pounds in respect e transportation of the aforesaid shipment of property by said non carriers in interstate commerce, whereby said property was ported from said point in New York Harbor to said Chicago ess rate and charge than that named and provided in the schedand tariffs of said common carriers published and filed as afore; contrary to the form of the statute in such case made and ided and against the peace and dignity of the United States.

COUNT 3

d the Grand Jurors aforesaid, upon their oaths aforesaid, do ier present:

The facts set forth in paragraphs number 1, 2, and 3 of the count of this indictment, which said facts are hereby referred d incorporated in this count as fully as if they were herein ted.

That during said period on, to wit, August 12, 1932, said dent tendered to said Lehigh Valley Railroad Company at Pier lorth River, in the State of New York, such point being within free lighterage and floatage limits of said New York Harbor fined in said schedules and tariffs, together with other shipments alm oil weighing in excess of 240,000 pounds, a shipment of oil of an aggregate weight of, to wit, 120,940 pounds, that two carload lots, which said palm oil was part of a larger f palm oil theretofore transported to said New York Harbor by tain vessel, to wit, S. S. "Georgic," with directions to transport 120,940 pounds of palm oil from said Pier 60 in said New York or over said connecting railway lines, to said Chicago, con-d to said defendant.

3. That during said period on, to wit, August 5, 1932, said defendant did order in writing from said Lehigh Valley Railroad Company tank barges in lieu of tank cars on floats for the handling of alongside said vessel in said New York Harbor to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lots of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

10 4. That said Lehigh Valley Railroad Company did thereupon, at said Pier 60, accept delivery of said 120,940 pounds of palm oil and, tank barges being then and there available, did handle, by and through its agent, Manhattan Lighterage Corporation, a corporation of the State of New York, said lot of palm oil by tank barge from said Pier 60 to said rail terminal at said Claremont Terminal, and at said Claremont Terminal did pump, by and through its agent, said Manhattan Lighterage Corporation, said palm oil into certain railway tank cars bearing the initials and numbers ISTX 417 and ISTX 422; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank cars, as aforesaid, over said connecting railway lines and in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did deliver said shipment at said Chicago to said defendant and did collect from said defendant freight charges in the amount of, to wit, $483.76, based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 120,940 pounds.

5. That on, to wit, August 17, 1932, said Manhattan Lighterage Corporation pursuant to an arrangement and agreement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and cause to be paid to said Lehigh Valley Railroad Company, said pumping charge in the sum of, to wit, $24.19, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 120,940.

11 6. That said defendant did pay, for the transportation including said pumping of the oil from tank barge to tank cars said sum of $483.76, and only said sum of $483.76 instead of the lawful aggregate freight charge, applicable under the aforesaid tariffs and schedules, of, to wit, $507.95, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 120,940 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 120,940 pounds; and said defendant did refrain from paying said common carriers or either of them, or any other person or corporation, said pumping charge of 2 cents per 100 pounds, applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, August 17, 1932, Durkee Famous Foods, Inc., defendant aforesaid, in the District of New Jersey and within the

iction of this Court, well knowing the premises aforesaid, unlly did knowingly, by means of the device aforesaid, solicit, , and receive a concession of 2 cents per 100 pounds in respect transportation of the aforesaid shipment of property by said on carriers in interstate commerce, whereby said property was orted from said point in New York Harbor to said Chicago, ss rate and charge than that named and provided in the schedad tariffs of said common carriers published and filed as aforecontrary to the form of the statute in such case made and led and against the peace and dignity of the United States.

COUNT 4

the Grand Jurors aforesaid, upon their oaths aforesaid, do r present:

he facts set forth in paragraphs number 1, 2 and 3 of the first of this indictment, which said facts are hereby referred to and orated in this count as fully as if they were herein repeated.

hat during said period on, to wit, August 12, 1932, said defendndered to said Lehigh Valley Railroad Company at Pier 60, River, in the State of New York, such point being within ee lighterage and floatage limits of said New York Harbor ned in said schedules and tariffs, together with other shipments n oil weighing in excess of 240,000 pounds, a shipment of palm an aggregate weight of, to wit, 120,120 pounds, that being two l lots, which said palm oil was part of a larger lot of palm retofore transported to said New York Harbor by a certain to wit, S. S. "Georgic," with directions to transport said pounds of palm oil from said Pier 60 in said New York r over said connecting railway lines, to said Chicago, con- to said defendant.

hat during said period on, to wit, August 5, 1932, said defendl order in writing from said Lehigh Valley Railroad Comank barges in lieu of tank cars on floats for the handling from de said vessel in said New York Harbor to the rail terminal Lehigh Valley Railroad Company at Claremont Terminal State of New Jersey, of said lots of palm oil which had been ransported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did thereupon, at said Pier 60, accept delivery of said 120,120 pounds of il and, tank barges being then and there available, did handle, through its agent, Manhattan Lighterage Corporation, a corn of the State of New York, said lot of palm oil by tank from said Pier 60 to said rail terminal at said Claremont al, and at said Claremont Terminal did pump, by and through it, said Manhattan Lighterage Corporation, said palm oil into railway tank cars bearing the initials and numbers ISTX 43 TX 306; that thereafter said common carriers did transport road said shipment loaded in and upon said railway tank cars, esaid, over said connecting railway line, and in and through the

District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did deliver said shipment at said Chicago to said defendant and did collect from said defendant freight charges in the amount of, to wit, $480.48, based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 120,120 pounds.

5. That on, to wit, August 17, 1932, said Manhattan Lighterage Corporation pursuant to an arrangement and agreement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and cause to be paid to said Lehigh Valley Railroad Company, said pumping charge in the sum of, to wit, $24.02, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 120,120 pounds.

14 6. That said defendant did pay, for the transportation including said pumping of the oil from tank barge to tank cars, said sum of $480.48, and only said sum of $480.48, instead of the lawful aggregate freight charge, applicable under the aforesaid tariffs and schedules, of, to wit, $504.50, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 120,120 pounds, plus said pumping charge of 2 cents per 100 pounds, and said weight of, to wit, 120,120 pounds; and said defendant did refrain from paying said common carriers or either of them, or any other person or corporation, said pumping charge of 2 cents per 100 pounds, applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, August 17, 1932, Durkee Famous Foods, Inc., defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept, and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported from said point in New York Harbor to said Chicago at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

15 COUNT 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs number 1, 2, and 3 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, August 12, 1932, said defendant tendered to said Lehigh Valley Railroad Company at Pier 61,

rth River, in the State of New York, such point being within said e lighterage and floatage limits of said New York Harbor as ined in said schedules and tariffs, together with other shipments of m oil weighing in excess of 240,000 pounds, a shipment of palm oil an aggregate weight of, to wit, 101,080 pounds, that being two car- d lots, which said palm oil was part of a larger lot of palm oil retofore transported to said New York Harbor by a certain sel, to wit, S. S. "Georgic," with directions to transport said ,080 pounds of palm oil from said Pier 60 in said New York rbor over said connecting railway lines, to said Chicago, consigned aid defendant.

That during said period on, to wit, August 5, 1932, said defend- id order in writing from said Lehigh Valley Railroad Company k barges in lieu of tank cars on floats for the handling from along- e said vessel in said New York Harbor to the rail terminal of l Lehigh Valley Railroad Company at Claremont Terminal in the te of New Jersey, of said lots of palm oil which had been trans- ported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did there- upon, at said Pier 60, accept delivery of said 101,080 pounds palm oil and, tank barges being then and there available, did dle, by and through its agent, Manhattan Lighterage Corporation, rporation of the State of New York, said lot of palm oil by tank ge from said Pier 60 to said rail terminal at said Claremont Ter- al, and at said Claremont Terminal did pump, by and through gent, said Manhattan Lighterage Corporation, said palm oil into ain railway tank cars bearing the initials and numbers ISTX 288 ISTX 320; that thereafter said common carriers did transport ailroad said shipment loaded in and upon said railway tank cars, foresaid, over said connecting railway line, and in and through District of New Jersey and within the jurisdiction of this Court, aid Chicago, and did deliver said shipment at said Chicago to defendant and did collect from said defendant freight charges he amount of, to wit, $404.32, based only upon the aforesaid line rate of 40 cents per 100 pounds and said weight of, to wit, 080 pounds.

That on, to wit, August 17, 1932, said Manhattan Lighterage poration, pursuant to an arrangement and agreement theretofore e with said defendant, and with intent secretly to assume and rb for the benefit of said defendant said pumping charge of 2 per 100 pounds provided in said schedules and tariffs and icable upon said shipment of palm oil, did pay and cause to be to said Lehigh Valley Railroad Company, said pumping charge he sum of, to wit, $20.21, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 101,080.

6. That said defendant did pay, for the transportation in- cluding said pumping of the oil from tank barge to tank cars, sum of $404.32, and only said sum of $404.32 instead of the lawful egate freight charge, applicable under the aforesaid tariffs and

schedules, of, to wit, $424.53, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 101,[illegible] pounds, plus said pumping charge of 2 cents per 100 pounds, and said weight of, to wit, 101,080 pounds; and said defendant did refrain from paying said common carriers or either of them, or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, August 17, 1932, Drukee Famous Foods, Inc., defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported from said point in New York Harbor to said Chicago at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

JOHN J. QUINN,
United States Attorney.

The United States of America vs. Durkee Famous Foods, Inc. Indictment for Viol. Sec. 1, Elkins Act; Sec. 41, Title 49 U. S. C. A. True Bill. J. L. Williamson, Foreman. John J. Quinn, U. S. Attorney.

[File endoresment omitted.]

18 In United States District Court, District of New Jersey

Criminal No. 7,918–B

[Title omitted.]

Plea in bar to indictment

Filed June 18, 1937

This defendant, Durkee Famous Foods, Inc., by its attorney in this behalf, Roger Hinds, comes into court here, and, having heard read the said alleged indictment found at the January Term of this court in the year 1937, which said alleged indictment was filed April 2, 1937, says that the United States of America ought not further to prosecute said indictment, or any count thereof, against it, because of the following matters and things, which it pleads in bar of its prosecution for any and all of the alleged offenses therein charged, and respectfully avers as follows, to wit:

1. That the alleged offenses attempted to be set forth in each and every count of the said alleged indictment, if committed at all, were

ctment herein, during which period said defendant had not fled ice, and conseqeuntly prosecution thereof is barred by the stat- of limitations applicable thereto, 18 U. S. Code, section 582.

Defendant repeats and realleges the averments of Paragraph 1 of, and further shows that, at the April Term in the year 1934 his court, an indictment was returned by the Grand Jury, being number 6821–B, covering the same offenses attempted to be al- leged in and by the present alleged indictment. That there- after defendant filed a motion to quash the indictment returned by the April 1934 Grand Jury, and thereafter, to wit: Febru- 2, 1937, an order was entered on defendant's motion to quash indictment, reading as follows:

his matter being opened to the Court by Roger Hinds, Esq., of sel with the defendent, Durkee Famous Foods, Inc., upon the on of said defendant to quash the indictment herein and each every count thereof, and to hold the same for nought, because ame is bad for failure to allege facts constituting a crime, and sufficient in law to require the said defendant to answer thereto, due notice of said motion having been duly served upon the ed States Attorney, and the United States of America, appearing Harlan Besson, Esq., United States Attorney, Daniel H. Kunkel, Special Assistant United States Attorney, and Burt L. Smelker, Attorney for Interstate Commerce Commission, and the said ndant Durkee Famous Foods, Inc., appearing by Roger Hinds, its attorney, and the Court having heard and considered the er on argument and on the briefs of the respective counsel, and pearing that said indictment and each and every count thereof d. for failure to allege facts constituting a crime and insuf- t in law to require the defendant to answer thereto, and charges ime, and that the application of said defendant, Durkee Famous s, Inc., should be granted:

is, on this 2nd day of February 1937, ORDERED, that the indictment herein and each and every count thereof, be and me is hereby quashed and held for nought.

"GUY L. FAKE.
"*United States District Court Judge.*"

t the indictment herein, which was returned by the January Grant Jury, was not returned in conformity with 18 U. S. Code, n 587, which provides only for the return of a new indictment one has been found defective, "at any time during the next ding term of court following such finding, during which a jury thereof shall be in session", inasmuch as the next suc- ng term of court following February 2, 1937, was the April Term, not the January 1937 Term.

The defendant realleges and reaffirms the averments of Para- s 1 and 2 hereof, and further shows that, as appears from the opinion of the court upon which it made the aforesaid order

was by the court found bad in substance and the allegations thereof not to constitute a crime. The said order quashing said indictment was therefore an appealable order under 18 U. S. Code, section 682, and consequently 18 U. S. Code, section 587, has no application to such an order, but is, and is intended to be, confined to the quashing of indictments for defects of form and pleadings, which orders are not appealable under 18 U. S. Code, section 682.

All of which said defendant Durkee Famous Foods, Inc., is ready and willing to verify, and therefore pleads the same in bar of any prosecution or punishment under said indictment or any count thereof, and says that to prosecute or punish it thereunder for any of the alleged offenses charged therein is contrary to the provisions of the statute of limitations, 18 U. S. Code, section 582.

Wherefore, the defendant prays judgment that the said alleged indictment be not further prosecuted against it, and that by this court it may be dismissed and discharged from the said premises without day and the said alleged indictment held for nought and quashed.

Dated, Trenton, N. J., June 18, 1937.

DURKEE FAMOUS FOODS, INC.,
Defendant,
By ROGER HINDS, *Attorney,*
Office and Post Office Address: 744 Broad Street,
Newark, New Jersey.

21 I hereby certify that the foregoing plea in bar is not interposed for delay, and in my opinion is well founded in point of law.

Dated Trenton, N. J., June 18, 1937.

_____,
Counsel for Defendant,
Durkee Famous Foods, Inc.

[File endorsement omitted.]

22 In United States District Court for the District of New Jersey

Criminal No. 7918–b

[Title omitted.]

Answer of United States to plea in bar to indictment

Filed Aug. 2, 1937

And now, August 2nd, 1937, comes the United States of America by John J. Quinn, United States Attorney in and for the District of New Jersey, and in answer to the Plea in Bar to the indictment filed April 9, 1937, in the above matter, respectfully represents:

1. That in answer to the averments contained in paragraph numbered 1. of the Plea in Bar it is admitted that the alleged offenses

et forth in each and every count of said indictment were committed
nore than three years preceding April 9, 1937, the date when said
ndictment was returned, during which period said defendant had
ot fled justice, but denies that prosecution of each and every offense
lleged to have been committed in said indictment is barred by the
statute of limitations.

3 2. That in answer to the averments contained in paragraph numbered 2. of the Plea in Bar it is admitted that at the April Term in the year 1934 of this Court an indictment was returned by the grand jury, at file No. 6831b, covering the same offenses alleged n and by the present indictment; that thereafter defendant herein iled a motion to quash said indictment returned by the April 1934 rand jury, and that thereafter on February 2, 1937, an order was ntered on defendant's motion to quash said indictment in the lanuage set out in paragraph 2 of the Plea in Bar; but denies that the ndictment herein, which was returned by the January 1937 grand ury, was not returned in conformity with 18 U. S. Code, Section 87, and further avers that under and by virtue of 18 Code, Sec. 587, imitation of prosecution of the offenses alleged in the indictment erein to have been committed by said defendant, was stayed.

3. That in answer to the averments contained in paragraph numbered 3. of said Plea in Bar it is denied that the opinion of the Court upon which the aforesaid order quashing said previous indictment was made, held that said previous indictment was bad in substance or that no offense described by 49 U. S. Code, Sec. 41, had been alleged to have been committed, but avers that said opinion holding that said previous indictment was insufficient was based upon construction of said indictment so as to demonstrate the failure of the government to allege essential facts necessary to bring

4 the offense within the provisions of 49 U. S. Code, Section 41. and in further answer it is averred that whether or not the rder made quashing said previous indictment was an appealable rder under 18 U. S. Code, Section 682 is immaterial in so far as he application of 18 U. S. Code, Section 587, is concerned.

4. And in further general answer it is averred that the indictment erein, filed April 9, 1937, is otherwise good and sufficient in law.

Wherefore, the United States of America prays that said Plea in Bar be forthwith dismissed and that said defendant be put upon its rial.

UNITED STATES OF AMERICA,
By JOHN J. QUINN,
United States Attorney.
WILLIAM F. SMITH,
Assistant United States Attorney.
DANIEL H. KUNKEL,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

25 In United States District Court, District of New Jersey

Criminal No. 7918–b

UNITED STATES OF AMERICA

v.

DURKEE FAMOUS FOODS, INC.

Criminal No. 7919–b

UNITED STATES OF AMERICA

v.

MANHATTAN LIGHTERAGE CORPORATION

Criminal No. 7920–b

UNITED STATES OF AMERICA

v.

COLGATE-PALMOLIVE-PEET COMPANY

Opinion

(Filed June 27, 1938)

(On defendants' pleas in bar to indictments)

NEWARK, N. J.,
Tuesday, June 14, 1938.

Before Hon. GUY L. FAKE, U. S. D. J.

Appearances: Daniel H. Kunkel, Esq., Special Assistant to the United States Attorney, for the Government. Roger Hinds, Esq., for defendant Durkee Famous Foods, Inc. Frank M. Swacker, Esq., for defendant Manhattan Lighterage Corporation. Messrs. Wall, Haight, Carey & Hartpence, by John A. Hartpence, Esq., and Alfred F. Conway, Esq., for defendant Colgate-Palmolive-Peet Company. W. W. Heironimus, Official Reporter.

26 The COURT. (Orally, at close of argument.) The issues here arise on three indictments, to each of which pleas in bar have been filed. This memorandum will be dispositive of the three cases.

The defendants were indicted on the 9th of April, 1937, for alleged violations of the Elkins Act, Title 49, Section 41.

The acts complained of in the indictments having been committed according to the dates set forth therein, more than three years prior to the filing of the indictments, Section 582 of Title 18 of the U. S. Code provides as follows:

"No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in Section 584 of this Title, unless the

tment is found or action is instituted within three years next such offense shall have been committed."

is contended for the Government that the pleas should not be ined because Section 587 of Title 18 of the U. S. Code provides llows:

henever an indictment is found defective or insufficient for any after the period prescribed and the applicable Statute of Limitations has expired, a new indictment may be returned at any time during the next succeeding term of Court following such finding, during which the Grand Jury thereof shall be in n."

is urged that a reasonable and proper consideration of this section causes it to become effective as to the then existing term of Court, ithstanding the fact that the statute itself is silent as to the then ng term. (Citing Endlich on Interpretation of Statutes, pages tc. U. S. v. N. Y. Central Railroad, 212 U. S. 509. U. S. v. ig Coal Co., 270 U. S. 512. U. S. vs. Baltimore Post Co., 2 Fed. 761, affirmed 268 U. S. 388. Ozawa vs. U. S., 260 U. S. 178.)

unsel for the defendants argue that to so construe the statute l cause the Court to enter the sphere of the legislature and in amend the Act to read as follows:

new indictment may be returned at any time during the next eding term of court, following such finding, during which the d Jury thereof shall be in session and as well at the Term in the indictment is found defective."

reover, it is urged that Section 587 must be strictly construed se it is an exception to the Statute of Limitations.

her arguments are offered by counsel for the defense, which appin defendants' briefs. They cite the following cases to sustain their position: U. S. v. Sheldon, 2 Wheaton 119–121 and 122. U. S. vs. McElvaine, 272 U. S. 633 at 639. U. S. vs. Scherton, 285 U. S. 518 at 521–2. 16 Corpus Juris 228, section 350.

e indictments were returned by a Grand Jury sitting for the ary Term of Court on April 9, 1937, but within the time fixed w for the April Term of Court at Newark, the January Term g been extended by an order of the Court.

the time the previous indictments were quashed by this Court, ree-year Statute of Limitations had then run against the alleged es.

* * * * * *

NEWARK, N. J.,
Monday, June 27, 1938.

aring continued from June 14, 1938. Same appearances.)

COURT. (Orally, at close of argument.) At the last session, I the facts and raised the issues upon which counsel have ap- before me today. Both sides have been diligent in their vors to assist the Court in ascertaining the law to be followed

here. No cases have been discovered bearing upon a construction of the section of the Statute of Limitations which is here involved. This has resulted in much research in an endeavor to find an analogous situation, and upon careful consideration of the arguments presented by counsel, as well as a consideration of the cases they have
29 cited, it is my conclusion that the Court, being without power to amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein. This leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

The pleas in bar are therefore sustained.

[File endorsement omitted.]

30 In United States District Court, District of New Jersey

On Plea in Bar. Criminal No. 7918–B

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

Order sustaining plea in bar

Filed June 28, 1938

This matter being opened to the Court by Roger Hinds, Esq., of counsel with the defendant, Durkee Famous Foods, Inc., upon said defendant's plea in bar to the indictment herein and each and every count thereof, and due notice to plead having been duly served upon the attorney for said defendant by the United States Attorney, and the United States of America appearing by John J. Quinn, Esq., United States Attorney, and Daniel H. Kunkel, Esq., Special Assistant United States Attorney, and the said defendant Durkee Famous Foods, Inc., appearing by Roger Hinds, its attorney, and the Court having heard and considered the matter on argument, and on the briefs of the respective counsel, and it appearing that said Plea in Bar is good and sufficient and should be sustained;

It is, on this 28 day of June, 1938, ordered that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said

fendant, and that said indictment be and the same is hereby accordly dismissed, discharged, held for nought and quashed.

GUY L. FAKE,
United States District Court Judge.

Consnted to as to form only:
JOHN J. QUINN,
United States Attorney.
By DANIEL H. KUNKEL,
Special Assistant United States Attorney.
[File endorsement omitted.]

In United States District Court, District of New Jersey

der continuing the January 1937 Term of Court at Trenton, New Jersey, to the April 1937 Term of Court at Newark, New Jersey

Filed April 5, 1937

It being presented to the Court by John J. Quinn, United States torney for the District of New Jersey, that certain sentences are ll pending in cases before this Court, and other business of the ited States is still pending before the Court, and application ing made,

It is, thereupon on this 5th day of April 1937, ordered that the nuary 1937 Term of this Court be and the same is hereby extended d continued during the April 1937 Term and until the further der of this Court for the following and all other purposes:

1. In order that the Grand Jury of that term may dispose of its finished business.

2. In order that the sentences set forth on the annexed list marked chedule A" and all other sentences pending before the Court may imposed.

3. In order that any other business, procedure or practice pertaing to the Court or the Government of the United States may be ansacted identically as if the January 1937 Term of Court had not pired.

FORMAN, *Judge.*

[File endorsement omitted.]

In United States District Court for the District of

New Jersey

Criminal No. 7918–B

[Title omitted.]

Petition for appeal

Filed July 25, 1938

Now comes the United States of America, plaintiff, by its counsel, d says that on June 28, 1938, this court rendered its judgment in

favor of the defendant against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors herewith filed.

Wherefore, United States of America prays that an appeal may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Dated this 25th day of July, 1938.

36 [File endorsement omitted.]

37 In United States District Court for the District of New Jersey

Criminal No. 7918–B

[Title omitted.]

Assignment of errors

Filed July 25, 1938

United States of America, plaintiff, by its counsel, now comes and in connection with its petition for an appeal, files the following assignment of errors upon which it will rely in its appeal to the Supreme Court of the United States from the final judgment rendered by this Court on June 28, 1938.

The District Court erred:

1. In sustaining the plea in bar.

2. In not overruling and dismissing the plea in bar.

3. In holding and adjudging that the statute of limitations had barred the prosecution of the offenses alleged in the several counts of the indictment.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587) did not limit the application of the statute of limitations (U. S. C., Title 18, Sec. 582) so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

5. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587) was effective to stay the statute of limitations only where the new indictment is returned by a grand jury in session during the next succeeding term of court following the term

38 at which the prior indictment was found defective or insufficient.

6. In failing and refusing to construe the statutes on which the new indictment was founded as permitting the return of the new

indictment by the grand jury empaneled at and for and in session during the same term of court at which the prior indictment was found defective or insufficient.

7. In failing and refusing to construe the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587) as permitting the return of the new indictment by the grand jury empaneled at and for and in session during the term of court at which the prior indictment was found defective or insufficient.

8. In failing and refusing to construe the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587) as permitting the return of the new indictment by the first grand jury in session upon or following the date upon which the prior indictment was found defective or insufficient, regardless of whether such grand jury was empaneled for the same term, or the next succeeding term, or some still later term following the term of court at which the prior indictment was found defective or insufficient.

9. In entering the order of June 28, 1938, sustaining the plea in bar and dismissing and quashing the indictment.

JOHN J. QUINN,
John J. Quinn,
United States Attorney.

Dated this —— day of July 1938.

39 [File endorsement omitted.]

40 In United States District Court for the District of New Jersey

[Title omitted.]

Criminal No. 7918–B

Order allowing appeal

Filed July 25, 1938

United States of America, plaintiff, having by its counsel made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court entered June 28, 1938, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and adjudged that the appeal be and the same is hereby allowed as prayed and made returnable within forty (40) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said final judgment was made and entered to the Supreme Court of the United States.

This 25 day of July 1938.

JOHN BOYD AVIS,
United States District Judge.

[File endorsement omitted.]

41 [Citation in usual form showing service on Roger Hinds filed July 30, 1938, omitted in printing.]

42 In United States District Court, District of New Jersey

[Title omitted.]

No. 7918–b

Docket entries

1937

Apr. 9—Indictment for Violating Section 1, Elkins Act &c.
June 1—Ordered adjourned to June 18, 1937.
18—Plea in bar by Roger Hinds, 744 Broad St., Newark, Atty, filed.
Aug. 2—Answer of United States to plea in Bar filed.

1938

June 14—Argument on plea in bar before Judge Fake.
" —Ord. off to June 27, 1938.
27—Oral Opinion by Judge Fake sustaining plea in bar &c filed.
28—Order Dismissing Indictment, sustaining plea in bar &c " (Fk).
July 25—Petition for Appeal filed.
" —Assignment of Errors "
" —Order allowing appeal filed (Avis).
" —Statement as to Jurisdiction filed.
" —Citation issued.
30—Notice to Appellee filed.
" —Citation filed.
" —Praecipe for Transcript of Record filed.

43 In United States District Court for the District of New Jersey

[Title omitted.]

Criminal No. 7918–B

Praecipe for transcript of record

Filed July 30, 1938

To the CLERK OF THE DISTRICT COURT:

Please transmit to the Supreme Court of the United States as the transcript of record in the above entitled case, the following pleadings, documents, and records.

1. Indictment.
2. Plea in bar.
3. Answer to plea in bar.
4. Opinion of court sustaining the plea in bar.
5. Order on opinion sustaining the plea in bar and quashing the indictment.

5 (a) Order of Court extending the January 1937 Trenton Term.

6. Petition for appeal.

7. Assignment of errors.
8. Statement as to jurisdiction.
9. Order allowing appeal.
10. Notice of service on appellee of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
11. Citation on appeal.
12. All docket entries in proper order.
13. Praecipe for transcript of record.
14. Clerk's certificate.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Service of a copy of the above praecipe is hereby acknowledged this th day of July 1938.

ROGER HINDS,
Attorney for Defendant.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

In United States District Court, District of New Jersey

Indictment

In the District Court of the United States of America in and for e District of New Jersey, at the April Term thereof, in the year 34.

The Grand Jurors of the United States of America duly empaneled, orn and charged to inquire in and for the body of the said District New Jersey, upon their oaths present:

COUNT 1

1. That throughout the period extending from January 1, 1932, to nd including September 30, 1933, Durkee Famous Foods, Inc., hereafter called defendant, was and still is, a corporation of the State Illinois, having a place of business in New York, in the State of ew York.

2. That throughout said period Manhattan Lighterage Corporaon was and still is a corporation of the State of New York, and as engaged, among other things, in the operation of tank barges in ew York Harbor and in the business of transporting by tank barge ertain bulk fluid commodities to wit, palm oil, cocoanut oil, olive oil ots, china wood oil, perilla oil, soya bean oil, fish oil, and molasses, rom alongside steamship and other points in said New York Harbor o the railway lines and rail terminals of common carriers by railroad ocated at points contiguous to New York Harbor.

3. That throughout said period Lehigh Valley Railroad Company and Pere Marquette Railway Company, were and still are corporation common carriers engaged in the transportation of property, in interstate commerce, by railroad, for hire, and over and by means
47 of their respective connecting railway lines, operated a through railway route for the transportation of property including palm oil, in carload lots, from alongside vessels and other points in said New York Harbor to a certain point on the line of said Pere Marquette Railway Company, to wit, Chicago in the State of Illinois.

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Chicago, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission by said Lehigh Valley Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

48 New Jersey Side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York Side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage

lege in lots of six cars or over, or when loaded in less than six provided the total weight of shipments equaled or exceeded 00 pounds; that said last mentioned tariffs and schedules further ided that when such articles therein designated as "not lighter- free," including palm oil, in lots of 240,000 pounds, were handled nk barges in lieu of tank cars on floats from alongside steamship id free lighterage and floatage limits in said New York Harbor, ransfer from barges to tank cars would be at the expense of the per, for which service a charge of 2 cents per 100 pounds would ade in addition to the rate from New York; that said rate of nts per 100 pounds and said pumping charge of 2 cents per 100 ds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

5. That prior to August 12, 1932, said Lehigh Valley Railroad Company and said Manhattan Lighterage Corporation entered into an agreement and arrangement whereby said Manhattan Lighterage Corporation agreed and undertook, among other gs, to furnish all necessary marine equipment and to transport nk barges of said Manhattan Lighterage Corporation all ship- ts of oils and other bulk commodities as designated by said Lehigh ey Railroad Company from designated points within said free terage and floatage limits of said New York Harbor, to designated s of said Lehigh Valley Railroad Company in the State of New ey and other points, including the pumping of shipments from barges into tank cars designated and placed by said Lehigh ey Railroad Company on and at said piers, for and at a compen- n of, to wit, 6½ cents per 100 pounds; that said arrangement and ement was in full force and effect throughout all times men- d in this indictment.

That during said period on, to wit, August 12, 1932, said de- lant tendered to said Lehigh Valley Railroad Company at Pier North River, in the State of New York, being within said free terage and floatage limits of said New York Harbor, together with r shipments of palm oil weighing in excess of 240,000 pounds, a ment of palm oil of an aggregate weight of, to wit, 120,880 nds, that being two carload lots, which said palm oil was a part of rger lot of oil theretofore transported to said New York Harbor certain vessel, to wit, "Georgic," with directions to transport 120,880 pounds of palm oil from said New York Harbor over connecting railway lines, to said Chicago, consigned to said de- lant; that said Lehigh Valley Railroad Company, by and through said agent, Manhattan Lighterage Corporation, then and there accepted delivery of said palm oil, and said Manhattan Lighterage Corporation, acting for and in behalf of said Lehigh Valley Railroad Company transported said palm oil by barge from said Pier 60 to the rail terminal of said Lehigh ley Railroad Company at Claremont Terminal in the State of Jersey and at said Claremont Terminal said Manhattan Light- ge Corporation pumped said palm oil into certain railway tank

cars, bearing the initials and numbers ISTX 227 and ISTX [illegible] that thereafter said common carriers transported said shipment loaded in and upon said railway tank cars, as aforesaid, over said connecting railway line, and in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did deliver said shipment at said Chicago to said defendant and did collect freight charges in the amount of $483.54 based only upon the aforesaid rate of 40 cents per 100 pounds.

7. That the lawful freight charges applicable upon said shipment under the aforesaid tariffs and schedules was $507.72 being the sum of said line haul rate of 40 cents per 100 pounds based on the aforesaid weight of, to wit, 120,880 pounds and said pumping charge of 2 cents per 100 pounds based upon the aforesaid weight of, to wit, 120,880 pounds.

8. That in accordance with said arrangement and agreement between said Lehigh Valley Railroad Company and said Manhattan Lighterage Corporation said Manhattan Lighterage Corporation did on, to wit, August 17, 1932, pay to said Manhattan Lighterage Corporation the sum of, to wit, $78.57 for the lightering by tank barge of said palm oil from said Pier 60 to said rail termial of said Lehigh Valley Railroad Company at said Claremont Terminal and for the pumping of said palm oil from tank barge into said tank railway cars at said Claremont Terminal, said sum of, to wit, $78.57 being based and computed at said rate of 6½ cents per 100 pounds.

51 9. That on, to wit, August 17, 1932, said Manhattan Lighterage Corporation, pursuant to an arrangement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said tariffs and schedules of rules, regulations, and charges at said New York Harbor, printed, published, and filed by said Lehigh Valley Railroad Company as aforesaid, applicable upon said shipment of palm oil, paid to said Lehigh Valley Railroad Company, the sum of $24.18, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 120,880 pounds.

10. That said Manhattan Lighterage Corporation did assume and absorb, for the benefit and advantage of said defendant, said pumping charge of 2 cents per 100 pounds.

11. That said defendant through and by means of a device employed with purpose to have said Manhattan Lighterage Corporation secretly absorb and assume said pumping charge of 2 cents per 100 pounds, for the benefit and advantage of said defendant, and thereby reduce said lawfully published and filed tariffs, rates and charges chargeable to said defendant, as aforesaid, and then and there well knowing the provisions of the aforesaid lawfully published and filed tariffs and schedules, and the premises aforesaid, on, to wit, August 17, 1932, unlawfully did knowingly solicit, accept, and receive from said Manhatton Lighterage Corporataion a concession and discrimination in the amount of 2 cents on each 100 pounds of said palm oil which was transported from said New York Harbor to said Chicago

nd in respect to said transportation, whereby said shipment of palm il was transported by railroad as aforesaid at and for a rate of 40 ents per 100 pounds, which was less than said rates aggregating 42 ents per 100 pounds named in the tariffs and schedules published and filed as aforesaid.

2 12. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do present and find that said Durkee Famous Foods, nc., defendant aforesaid, in the District of New Jersey and within he jurisdiction of this court, at the time, in the manner and form nd through a device as aforesaid, unlawfully did knowingly solicit, ccept, and receive a concession and discrimination in respect to the nterstate transportation of property conducted by the common car- ie; aforesaid through said District of New Jersey, whereby said roperty was transported by said common carriers at a less rate han the published and applicable rate named in the tariffs published nd filed as aforesaid; contrary to the statute in such case made nd provided and against the peace and dignity of the United tates.

3

COUNT 2

And the Grand Jurors aforesaid, upon their oaths aforesaid, do urther present:

1. The facts set forth in paragraphs number 1, 2, 3, 4, and 5 of he first count of this indictment, which said facts are hereby referred o and incorporated in this count as fully as if they were herein epeated.

* * * * * * *

COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do urther present:

1. The facts set forth in paragraphs number 1, 2, 3, 4, and 5 of he first count of this indictment, which said facts are hereby referred o and incorporated in this count as fully as if they were herein epeated.

* * * * * * *

COUNT 4

And the Grand Jurors aforesaid, upon their oaths aforesaid, do rther present:

1. The facts set forth in paragraphs number 1, 2, 3, 4, and 5 of e first count of this indictment, which said facts are hereby referred and incorporated in this count as fully as if they were herein peated.

* * * * * * *

COUNT 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs number 1, 2, 3, 4, and 5 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were here repeated.

* * * * * * *

54

COUNT 6

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

* * * * * * *

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of cocoanut oil, in carload lots, from said New York Harbor to said Chicago, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations, and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed *and had been duly printed* and had been published and had been filed with the Interstate Commerce Commission, by said Lehigh Valley Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

55

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

said last mentioned tariffs and schedules further provided that erty therein specified as articles "not lighterage free," including anut oil, when loaded in tank cars, would be accorded free float- privilege in lots of six cars or over, or when loaded in less than ars, provided the total weight of shipments equaled or exceeded 00 pounds; that said last mentioned tariffs and schedules further ided that when such articles therein designated as "not lighterage ," including cocoanut oil, in lots of 240,000 pounds, were handled nk barges in lieu of tank cars on floats from alongside steamship other points in said free lighterage and floatage limits in said New k Harbor, the transfer from barges to tank cars would be at the nse of the shipper, for which service a charge of 2 cents per pounds would be made in addition to the rate from New York; said rate of 40 cents per 100 pounds and said pumping charge cents per 100 pounds were the lawful rates and the only lawful s applicable on the shipment of cocoanut oil hereinafter described.

* * * * * * *

COUNT 7

nd the Grand Jurors aforesaid, upon their oaths aforesaid, do her present:

The facts set forth in paragraphs numbered 1 and 2 of the first nt, and in paragraphs numbers 2, 3, and 4 of the sixth count of indictment, which said facts are hereby referred to and incorpo- d in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 8

nd the Grand Jurors aforesaid, upon their oaths aforesaid, do her present:

. The facts set forth in paragraphs numbered 1 and 2 of the first nt, and in paragraphs numbers 2, 3, and 4 of the sixth count his indictment, which said facts are hereby referred to and incor- ated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 9

nd the Grand Jurors aforesaid, upon their oaths aforesaid, do ther present:

. The facts set forth in paragraphs numbered 1 and 2 of the first nt, and in paragraphs numbers 2, 3, and 4 of the sixth count of s indictment, which said facts are hereby referred to and incor- ated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 10

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 11

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and
57 incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 12

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 13

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 14

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of

s indictment, which said facts are hereby referred to and incor-ated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 15

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 4 of the first count, and in paragraphs numbers 2, 3, and 4, of the h count of this indictment, which said facts are hereby referred and incorporated in this count as fully as if they were herein eated.

* * * * * * *

In United States District Court, District of New Jersey

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC.

Motion to quash

Filed Jan. 15, 1937

omes now the defendant, Durkee Famous Foods, Inc., by Roger ds, its attorney, and, upon leave of court, withdraws its plea of guilty, heretofore interposed, and moves to quash the indictment in and each and every count thereof, because the same are insuffi-t in law to require the defendant to answer thereto, for the owing reasons:

s shown by the annexed stipulation of the plaintiff, the charge tioned in the last half of the fourth paragraph of the first nt of the indictment, and thereafter and in each of the succeeding nts of said indictment, referred to as a pumping charge contained he tariffs and schedules of the carriers mentioned in the indict-t, is provided for by a rule reading as follows:

Property loaded in tank cars will be accorded free floatage privi-s in lots of six cars or over, or when loaded in less than six cars vided the total weight of shipment exceeds or equals 240,000 nds.

When ordered by the shipper or consignee, in writing, and tank rs are available, Vegetable Oils, Foots, Settlings and Tank Bot-s and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasses ots of 240,000 pounds or more, may be handled in tank barges ieu of tank cars on floats from or to alongside steamship and

points within free lighterage limits of New York Harbor. Tra
from barges to tank cars or from tank cars to barges to be at exp
of shipper or consignee, for which service a charge of 2 cents p
100 pounds will be made in addition to the rates from or to
York."

That is, said pumping charge is applicable upon oils handled
tank barges only "when ordered by the shipper or consignee
writing"; and in no count of said indictment is it alleged th
60 the handling of said oils in tank barges was ordered in wr
ing by the shipper or consignee, and consequently each
every count of said indictment is bad for failure to allege facts co
stituting a crime.

Wherefore, this defendant respectfully prays that the said indi
ment and each and every count thereof be quashed and held
naught.

ROGER HINDS,
Attorney for Defendant,
Durkee Famous Foods, Inc.

Dated Newark, N. J., April —, 1935.

61 In United States District Court, District of New Jersey

UNITED STATES OF AMERICA
vs.
DURKEE FAMOUS FOODS, INC.

Stipulation

It is hereby stipulated by and between the United States
America, the plaintiff, and Durkee Famous Foods, Inc., the defen
ant, in the above-entitled action, that the charge mentioned in th
last half of the fourth paragraph of the first count of the indict
ment, and thereafter and in each of the succeeding counts, of sa
indictment, referred to as a pumping charge contained in the tarif
and schedules of the carriers mentioned in the indictment, is pro
vided for by a rule reading as follows:

"Property loaded in tank cars will be accorded free floatage pri
ileges in lots of six cars or over, or when loaded in less than six car
provided the total weight of shipment exceeds or equals 240,00
pounds.

"When ordered by the shipper or consignee, in writing, and tan
barges are available, Vegetable Oils, Foots, Settlings and Tank Bo
toms and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasse
in lots of 240,000 pounds or more, may be handled in tank barge
in lieu of tank cars on floats from or to alongside steamship and
points within free lighterage limits of New York Harbor. Transfe
from barges to tank cars or from tank cars to barges to be at expens
of shipper or consignee, for which service a charge of 2 cents pe

ounds will be made in addition to the rates from or to New

."

UNITED STATES OF AMERICA,
Plaintiff.

By HARLAN BESSON,
United States Attorney.
DANIEL H. KUNKEL,
Spec. Asst. U. S. Atty.
DURKEE FAMOUS FOODS, INC.,
Defendant.

By ROGER HINDS,
Attorney for Defendant.

e and timely service admitted. Harlan Besson, U. S. Atty.
l. Kunkel.
ile endorsement omitted.]

In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821–B

UNITED STATES OF AMERICA
vs.
DURKEE FAMOUS FOODS, INC., DEFENDANT

ppearances: Harlan Besson, Esq., United States Attorney. iel H. Kunkel, Esq., Special Assistant United States Attorney. t L. Smelker, Esq., Attorney for Interstate Commerce Commis-. Opposed. Roger Hinds, Esq., Attorney for Durkee Famous ds, Inc., for the motion.

Memorandum

Filed Jan. 14, 1937

AKE, District Judge:

he indictment here is intended to charge an offense against the risions of Section 1 of the Elkins Act, Sec. 41, Title 49, U. S. C. A. he gist of the issue before me resides in the allegation in the ictment that the defendant "through a device aforesaid, unlaw-y did knowingly solicit, accept, and receive a concession and crimination in respect to interstate transportation of prop-* * * whereby said property was transported by said com-n carriers at a less rate than the published and applicable rate ed in the tariffs published and filed as aforesaid; contrary to statute in such case made and provided."

ection 41 of the Act makes it a criminal offense to "accept or ive any rebate concession, or discrimination in respect to trans-tation of any property * * * whereby any such property

shall by any device whatever be transported at a less rate than the
named in the tariffs published and filed by such carrier."
63 The indictment discloses that the rate involved is 40 cents
per hundred pounds and in addition thereto a charge of 2
cents per 100 pounds, referred to as a pumping charge. The in
here is based entirely on the 2 cent pumping charge. On this po
the indictment reads as follows: "That said defendant did assume and
absorb, for the benefit and advantage of said Durkee Famous Foods,
Inc., said pumping charge of 2 cents per 100 pounds."

This leads to an examination of the rule or tariff for the purpose
of ascertaining when and under what circumstances the 2 cent pump-
ing charge may become effective. By stipulation in writing between
the parties it is agreed that the item for pumping arises at all
under a rule reading as follows:

"Property loaded in tank cars will be accorded free floatage privileges in lots of six cars or over, or when loaded in less than six cars provided the total weight of shipment exceeds or equals 240,000 pounds.

"When ordered by the shipper or consignee, in writing, and tank barges are available, Vegetable Oils, Foots, Settlings and Tank Bottoms and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasses in lots of 240,000 pounds or more, may be handled in tank barges in lieu of tank cars on floats from or to alongside steamship and points within free lighterage limits of New York Harbor. Transfer from barges to tank cars or from tank cars to barges to be at expense of shipper or consignee for which service a charge of 2 cents per 100 pounds will be made in addition to the rates from or to New York."

It should be noted that while the indictment is found under the Elkins Act, the crime involved is not fully defined in that Act. We are compelled to look elsewhere for the factors which lead to a complete definition. We find these factors in the filed tariff (rule) and for present purposes they have the same force and effect as
64 statutory provisions. Looking then to the tariff, it will be seen, among other things, that the 2 cent charge does not become effective unless tank barges are "* * * ordered by the shipper or consignee, in writing and tank barges are available, * * *." These requirements are conditions precedent to the right to bill or assess the 2 cent charge. It, therefore, follows that no criminal concession or discrimination can be spelled out under the Elkins Act when read with the tariff unless these essential conditions are met in the language of the indictment. The indictment is silent on that subject; therefore, it charges no crime and the motion to quash must be granted.

See United States v. Cook, 84 U. S. 186; Davis v. Henderson, 266 U. S. 92; U. S. v. Olds Motor Works, 4 Fed. Supp. 65; and United States v. Wood, 159 Fed. 187.

In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821–B

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

Appearances: Harlan Besson, Esq., United States Attorney. niel H. Kunkel, Esq., Special Assistant United States Attorney. r L. Smelker, Esq., Attorney for Interstate Commerce Commis-n. Opposed. Roger Hinds, Esq., Attorney for Durkee Famous ds, Inc., for the Motion.

norandum correcting and amending a memorandum filed in this cause on January 14, 1937

Filed Jan. 25, 1937

AKE, District Judge:

he memorandum filed by me in the above entitled cause on the day of January, 1937 is hereby corrected and amended as fol-: Strike out the paragraph on page 2 of the aforesaid memoran- which reads as follows:

The indictment discloses that the rate involved is 40 cents per dred pounds and in addition thereto a charge of 2 cents per 100 ds, referred to as a pumping charge. The issue here is based ely on the 2 cent pumping charge. On this point the indictment s as follows: 'That said defendant did assume and absorb, for the fit and advantage of said Durkee Famous Foods, Inc., said pump-harge of 2 cents per 100 pounds."

insert in lieu thereof, the following paragraph:

e indictment discloses that the rate involved is 40 cents per dred pounds and in addition thereto a charge of 2 cents per 100 ds, referred to as a pumping charge. The issue here is based en- on the 2 cent pumping charge. On this point the indictment s as follows: "That said Manhattan Lighterage Company did me and absorb, for the advantage of said defendant, said pump-ing charge of 2 cents per 100 pounds."

[Clerk's certificate to foregoing papers omitted in printing.]

Supreme Court of the United States

Stipulation re enlargement of record, etc.

notion of defendant-appellee to enlarge the record in this matter ding thereto:

Memorandum opinion of the United States District Court filed ary 14, 1937, supporting the order referred to in the plea in bar

and answer herein quashing the previous indictment herein (Crimi... No. 6821–b).

2. Correcting memorandum opinion of said United States Distri... Court filed January 25, 1937, correcting the above mentioned opini... (Crimin... No. 6821–b).

3. ... n, including stipulation annexed thereto to quash said pr... vious ... ment, filed on or about April 3, 1935 (Criminal No. 6821-b... referred to in the plea in bar and answer herein.

4. Prior indictment herein in said United States District Cou... returned and filed at the April 1934 Term of said District Cou... (Criminal No. 6821–b).

having been granted by the Court without objection of the Solicito... General, it is hereby

Stipulated, that in so far as the said prior indictment is concerne... only the following parts need be printed:

(a) The first count in full;
(b) Paragraph "1" of Counts 2 to 5 inclusive;
(c) Paragraph "3" of Count 6;
(d) Paragraph "1" of Counts 7 to 15 inclusive.

and it is further

67 Stipulated, that the said first count is typical of all of the fifteen counts of said prior indictment. Dated: Newark, N.J. November 23, 1938.

ROBERT H. JACKSON,
Solicitor General of the United States.

ROGER HINDS,
Counsel for Appellee, Durkee Famous Foods, Inc.

68 In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed Aug. 30, 1938

I

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

Robert H. Jackson.
ROBERT H. JACKSON,
Solicitor General.

August --, 1938.

rvice of a copy of the above Statement of Points and Designa-
of Record to be Printed acknowledged August 26, 1938.

ROGER HINDS,
Counsel for Appellee.

ile endorsement omitted.]

ndorsement on cover:] Enter: Attorney General. File No.
. New Jersey D. C. U. S. Term No. 309. The United States
merica, Appellant, vs. Durkee Famous Foods, Inc. Filed Au-
30, 1938. Term No. 309 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938